

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76 7476

Orig.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC. as Assignee of Claims
of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellees,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

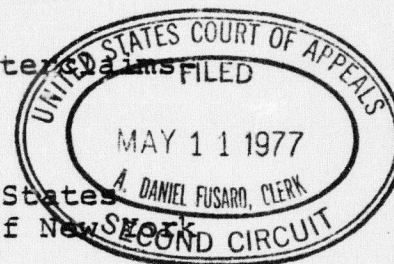
Defendants-Appellees-Cross-Appellants,

and

NEWBURGER, LOEB & CO., a New York Limited Partnership,
ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D.
STERN, as Executors of the Estate of Leo Stern, ROBERT
L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J.
RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME
TARNOFF, as Executors of the Estate of Ned D. Frank, FRED
KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT
S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERGERG &
GRUTMAN, a Partnership, (formerly known as Finley, Kumble,
Underberg, Persky & Roth and Finley, Kumble, Heine,
Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims
Appellants-Cross-Appellees.

Appeal from a Judgment of the United States
District Court for the Southern District of New York



REBUTTAL BRIEF OF APPELLANT FINLEY, KUMBLE,
WAGNER, HEINE, UNDERBERG & GRUTMAN

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and

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Counterclaims-Appellant-Cross-Appellee
Finley, Kumble, Wagner, Heine, Underberg
& Grutman

In its reply brief on the cross-appeal, which relates solely to the District Court's dismissal of the "employment opportunity" counterclaims, the Gross faction has cited four cases on the issue of jurisdiction which were omitted from its answering brief on the main appeal and which are unrelated to the cross-appeal.* None of these cases was cited by the District Court. We respectfully submit that a brief response by appellants covering these cases is necessary in order for the Court fully to evaluate the jurisdiction issue. Rather than taking additional time for oral argument, we request the Court's permission to submit this rebuttal brief in response to the four previously uncited cases now advanced by the Gross faction.

A. The Lesnik Case.

In support of its argument that its state law counterclaims are compulsory, the Gross faction cites this Court's decision in Lesnik v. Public Industrials Corporation, 144 F.2d 968 (2d Cir. 1944). (See Gross Reply Br. 26-27.)

The Gross faction's reliance on this case is misplaced, for the following reasons.

* Lesnik v. Public Industrials Corporation, 144 F.2d 968 (2d Cir. 1944); Cutting Room Appliances Corp. v. Empire Cutting Machine Co., 186 F.2d 997 (2d Cir. 1951); Denys Fisher (Spirograph) Ltd. v. Louis Marx & Co. of W.Va., Inc., 306 F.Supp 956 (N.D.W.Va. 1969)) and M.L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (E.D.Pa. 1964).

First, the Lesnik decision did not hold that a counterclaim becomes compulsory merely because it is related to a defense to the complaint. On the contrary, the decision is completely silent on this issue. Moreover, it is apparent that this Court did not consider the counterclaims involved in Lesnik to be a defense to the complaint, because it affirmed the District Court's judgment for plaintiff, while remanding for a new trial on defendant's counterclaims (144 F.2d at 978). Thus, contrary to the Gross faction's assertion, the Lesnik decision provides no support for the argument that the counterclaims in this action are compulsory because they are related to a defense to plaintiff's churning claim.

Second, Lesnik did not concern the issue on this appeal: whether the District Court had subject matter jurisdiction over the counterclaims. In Lesnik, unlike here, there was complete diversity of citizenship between the defendant and all other parties. Thus, the Court noted that the parties "must concede the court's substantive jurisdiction over the counterclaims." 144 F.2d at 973. The principal issue in Lesnik was whether venue was proper as to the additional defendants on counterclaims -- a question which is not present here. Thus, the Court's discussion of whether the counterclaims in Lesnik were compulsory related solely to its determination of the question of venue. Although the Court did not elaborate on the relationship between the question of whether counterclaims

were compulsory and the question of venue, it drew a sharp line of demarcation between "the mere waivable privilege of venue" on the one hand, and "substantive and constitutional jurisdiction" on the other (144 F.2d at 975). We respectfully submit that the Court's determination of the compulsory nature of the counterclaims may have been much different in that case if the issue were whether the District Court had subject matter jurisdiction over the counterclaims.

Third, since there was diversity of citizenship in Lesnik, even if the counterclaims were permissive, they would have been proper as to the plaintiff. Thus, to hear the counterclaims vis-a-vis the additional parties on the counterclaims would not materially expand the scope of the case. This factor is particularly important because the plaintiff was only a nominee of the additional counterclaim defendants. The result of allowing the counterclaims to be asserted against the additional parties was, in effect, to bring before the Court the real parties in interest.

B. The Gross Faction's Other Cases

The Gross faction cites three cases for the proposition that pendent jurisdiction is available to a counterclaimant (Gross Reply Br. 32). Two of the cases cited -- Cutting Room Appliances Corp. v. Empire Cutting Machine Co., 186 F.2d 997 (2d Cir. 1951), and Denys Fisher (Spirograph) Ltd. v. Louis

Marx & Co. of W. Va., Inc., 306 F.Supp 956 (N.D.W.Va. 1969) -- are not on point. Both of these cases deal with a federal statute, 28 U.S.C. §1338(b), which expressly gives the district courts jurisdiction of "any civil action" for unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws. In each case, the Court held that this statute could be utilized to support joinder of a non-federal counterclaim for unfair competition with a related federal counterclaim under the copyright, patent or trademark laws. Thus, neither of these cases dealt with, nor were they interpreting, the judicially created doctrine of pendent jurisdiction. Rather, they were interpreting a federal statute and concluded that the words "any civil action" encompassed counterclaims.

The third case cited in the Gross reply brief on this point is M. L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (E.D.Pa. 1964). Since Lee is a Pennsylvania District Court case, it is certainly not controlling here. Moreover, the Pennsylvania District Court is, of course, within the Third Circuit, which appears to have disregarded Lee. As set forth in our reply brief at p. 14, one of the few cases which contain any discussion of this issue is a Third Circuit case decided ten years after Lee -- Beach v. KDI Corp., 490 F.2d 1312, 1318

(3rd Cir. 1974) -- which indicates that the doctrine of pendent jurisdiction extends only to the non-federal claims asserted by plaintiff -- not to those asserted by a counter-claimant.

Dated: New York, New York
May 10, 1977

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD SUTTON, being duly sworn deposes and says; that deponent is over the age of 18 years and resides at 325 E. 41st Street, New York, New York.

That on the 10th day of May, 1977 deponent served the within Rebuttal Brief on behalf of Finley Kimble Wagner Heine Underberg & Grutman on:

OSMOND K. FRAENKEL, ESQ.
Attorney for Additional Defendants
on Counterclaims Newburger, Loeb
& Co., Andrew M. Newburger,
Robert L. Newburger, Robert L.
Stern, Richard D. Stern, Walter D.
Stern and Robert L. Stern, as
Executors under the Last Will and
Testament of Leo Stern, deceased;
and Sanford Roggenburg
120 Broadway
New York, New York 10005

by then and there leaving a true copy of the same with the person having charge of his office.

Edward Sutton

Edward Sutton

Sworn to before me this
10th day of May, 1977.

Clara A. Haller
Notary Public

CLARA A. LAURO
Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

PAUL R. LEVENSON, being duly sworn deposes and says;
that deponent is over the age of 18 years and resides at
15 Central Avenue, Staten Island, New York 10301.

That on the 10th day of May, 1977 deponent served the
within Rebuttal Brief on behalf of Finley Kimble Wagner Heine
Underberg & Grutman on:

GOLD, FARRELL & MARKS, ESQS. - left with Alicia Messina
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Attorneys for Additional Defendant
on Counterclaims Fred Kayne

ROBERT S. PERSKY, ESQ.
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Pro Se
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New York, New York 10022

MARTIN E. SILFEN, P.C. & BONDY
& SCHLOSS, ESQS. - left with Marion Goddard
545 Fifth Avenue
New York, New York 10017

by then and there leaving a true copy of the same with his clerk,
partner; person having charge of said office.

Paul R. Levenson
Paul R. Levenson

Sworn to before me this
10th day of May, 1977.

Clara A. Lauro
Notary Public

CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
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Commission Expires March 30, 1978

CLARA A. LAURO
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Certificate filed in New York County
Commission Expires March 30, 1978

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

That on the 10th day of May, 1977 deponent served the within Rebuttal Brief on behalf of Finley Kimble Wagner Heine Underberg & Grutman on:

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff Newburger,
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LEON BAER BORSTEIN, ESQ.
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by then and there leaving a true copy of the same with his clerk,
partner; person having charge of said office.

Robert L. Sanders, Jr.

Edward Hutton
Notary Public

EDWARD H. SUTTON
Notary Public, State of New York
No. 3907350
Qualified in New York County
Commission Expires March 30, 1979

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

CLARA A. LAURO, being duly sworn, deposes and
says:

I am not a party to the action, am over 18 years
of age and reside at 10 Welwyn Road, Great Neck, New York.

On May 10, 1977, I served the attached Rebuttal
Brief upon the following attorney at the address designated
by him for that purpose:

Lawrence Berkowitz, Esq.
(Pro se additional defendant
on counterclaim)
10612 Ohio Avenue
Los Angeles, California 90024

Said service was made by depositing a true copy
of the attached Rebuttal Brief on behalf of Finley Kumble
Wagner, etc., enclosed in a postpaid, properly addressed
wrapper, in an official depository under the exclusive
care and custody of the United States Post Office Department
within the State of New York.

Clara A. Lauro
Clara A. Lauro

Sworn to before me this
10th day of May, 1977.

Edward Hutton
Notary Public

EDWARD H. SUTTON
Notary Public, State of New York
No. 3907350
Qualified in New York County
Commission Expires March 30, 1979

